Supreme Court, U.S.
FILED

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No.

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In The

SUPREME COURT OF THE UNITED STATES

****

October Term, 1994

JERRY L. EDWARDS,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA) and Its AFFILIATED LOCAL 796,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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JACK MARWOOD SHORT
Counsel of Record
1709 Utica Square, Suite 230
Tulsa, OK 74114-1420
918/744-8000

R. Forney Sandlin
P.O. Box 0791
Muskogee, OK 74402-0791
918/683-5513

Attorneys for Petitioner

May 1995

60 pp

QUESTIONS PRESENTED

1. This suit by Edwards against his Union for breach of its duty of fair representation was dismissed as barred by the six-month limitation period established by DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983): but, did the Union's unsuccessful §301 suit against the employer to vacate the arbitrator's dismissal of Edwards' grievance distinguish this suit from a hybrid and bring it within Oklahoma's two-year statute of limitations; and, should DelCostello be reconsidered by this Court?

2. Was the six-month limitation period, if applicable, equitably tolled by the Union's breach of its fiduciary duty to inform Edwards of his legal rights, including his right to sue the Union; and, by not responding to Edwards' four (4) demand letters?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Jerry L. Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion by the Tenth Circuit Court of Appeals, affirming the trial court's dismissal of Petitioner's Complaint is reported. Edwards v. International Union, UPGWA, 46 F.3d 1047 (10th Cir. 1995) (App. A, 1a-32a).

The opinion and final judgment by the United States District Court for the Eastern District of Oklahoma, dismissing Petitioner's Complaint On Unions' Breach Of Duty Of Fair Representation is unreported. Edwards v. International Union, et al., Case No. 93-455-NJ, entered December 14, 1993. (App.B, 33a-45a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked on the following grounds:

January 31, 1995, is the date of entry of the judgment by the United States Court of Appeals for the Tenth Circuit in accordance with its opinion of the same date. It is the judgment sought to be reviewed.

February 23, 1995, is the date of entry of the Tenth Circuit Order denying the Petitioner's petition for rehearing.

Title 28 U.S.C. § 1254(1), provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> . . . .

which Petitioner believes is the statutory provision conferring jurisdicion on this Court to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

This Petition seeks review of a judgment by a United States Court of Appeals wherein the United States District Court for the Eastern District of Oklahoma, the court of first instance, was vested with jurisdiction by Section 301 of the Labor Management Relations Act of 1947, 29 U. S.C. § 185.

Jerry Edwards was employed by Trover Security Services, Inc. (Trover) as a security officer assigned to the McAlester Army Ammunition Plant, McAlester, Oklahoma with which Trover was under contract to provide security service. On June 28, 1991, Trover fired Edwards, claiming he was sleeping on duty. The UPGWA and Trover are parties to a collecltive bargaining agreement containing a grievance procedure for union members. Edwards was a union member when fired. The Consitution and By-Laws of UPGWA designate the unions as

exclusive agents of its members on employment matters.

On July 1, 1991, the UPGWA timely filed a grievance protesting Edwards' discharge which Trover denied; then on July 23, 1991, UPGWA notified Trover it intended to seek arbitration.

Five months later, on December 23, 1991, UPGWA selected an arbitrator to which Trover agreed, reserving an objection that the selection was untimely.

On February 14, 1992, the arbitrator conducted an evidentiary hearing; but, on March 26, 1992, he dismissed the grievance holding the five month delay by the unions in selecting the arbitrator was untimely. He did not rule on the merits.

On June 22, 1992, the UPGWA and its Affiliate Local 796 (hereafter Union) filed a Complaint against Trover in the United States District Court for the Eastern District of Oklahoma, Case No. Civ-92-378-S

to vacate the arbitration award and order a decision on the merits of the grievance.

On October 28, 1992, the district court entered its order refusing to vacate the arbitration award.

Counsel for the Union in that action, which is the same firm representing it in this action (Gregory, Moore, Jeakle, et al., Detroit, MI), mailed a copy of that court order to Mr. Edwards. The Union did not appeal that order nor did it or its counsel inform Mr. Edwards of his legal rights, including a possible cause of action against the Union for breach of duty of fair representation (BDFR) with a six-month statute of limitations.

Mr. Edwards retained legal counsel, who, on November 28, 1992, mailed a letter to Mr. Eugene McConville, President, International Union, in Roseville, MI, claiming money damages for Edwards' losses caused by the Union's BDFR, requesting a reply by December 21, 1992.

There was no response; so, on December 23, 1992, he mailed a follow-up letter; another follow-up on March 29, 1993; and, a final follow-up on May 7, 1993(certified return receipt requested and received).

In his written decision, the arbitrator wrote that the Union stated its delay was due to the grievance being circulated by the regional and national union office, then sent to counsel for review. Edwards assumed his letters were receiving similar treatment.

When he'd had no response at all from the Union president, Edwards' lawyer, Jack Short, filed his Complaint on July 6, 1993.

On July 13, 1993, Scott Brooks, Union lawyer, faxed a letter to Short asserting DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) established a six-month statute of limitations barring this action and requested its dismissal with a threat of sanctions.

On July 15, 1993, Short faxed a response to Brooks citing Reed v. United Transportation Union, 488 U.S. 319 (1989) for its explication of DelCostello being a narrow exception to the general rule that state law is the norm for borrowing limitation periods. And, contending this is a straight-forward action against the Unions akin to an action for legal malpractice which has a two (2) year limitation period in Oklahoma. Petitioner declined the request to dismiss his case and again suggested negotiating a settlement.

On July 29, 1993, the Union filed a Motion To Dismiss with a brief in support contending DelCostello established a six-month statute of limitations for hybrid lawsuits alleging breach of the duty of fair presentation by the union and/or breach of contract by the employer; so this action is time-barred because it was filed eight (8) months after this cause accrued.

On August 5, 1993, Petitioner filed a Response to the Union's motion to dismiss asserting DelCostello applies only to hybrid §301/fair representation suits and it doesn't apply here because this is an action against the Union only for breach of duty of fair representation. Further, Article VI, Section 14 of the Constitution of the UPGWA imposes a fiduciary duty on the Union to inform Edwards of all of his legal rights including that Edwards had a cause of action against the Union for breach of duty of fair representation with a six-month statute of limitations, in their opinion. Failure to do so tolled the six-month or any statute of limitation indefinitely. And, the Union's failure to respond to any of petitioner's four (4) demand letters breached that fiduciary duty and tolled any applicable statute of limitations. Petitioner contends these assertions are extensions or modifications of the federal equitable tolling doctrine.

Petitioner also asserted the Oklahoma two (2) year statute of limitations for legal malpractice applied here and this action was filed well within it.

On August 13,1993, the Union replied: this is a hybrid suit even though the action is only against the Union because Edwards could have joined Trover, his employer, as a defendant.

On December 14, 1993, the trial court granted the Union's motion to dismiss on findings that this is a hybrid §301/fair representation suit and "The Union's alleged failure to inform plaintiff of the six-month limitation period and its alleged failure to respond to plaintiff's demand letters simply do not affect plaintiff's claim for breach of duty of fair representation in connection with the timely prosecution of his grievance. In sum, plaintiff cannot unilaterally extend the limitation period by alleging omissions

on the part of the Union which are not related to the duty of fair representation claim asserted in his complaint." (App.B, 44a).

On December 21, 1993, petitioner filed a motion for the court to reconsider its Order, pointing out the Union's §301 suit against Trover, his employer, on his behalf, to vacate the arbitrator's decision distinguishes this case from a hybrid §301 fair representation suit because it foreclosed Edwards from bringing another §301 suit against Trover; hence, the two-year statute of limitations applies.

On February 8, 1994, the trial court denied Edwards' motion to reconsider and he timely appealed to the Tenth Circuit presenting two issues:

> 1. The fact the Union filed and lost a separate §301 suit against Trover on his behalf precluded him from filing another §301 claim against Trover and that fact distinguishes this case from a "hybrid" §301/unfair representation action with a six-month statute of limitation period from the LMRA.

> 2. If the six-month statute of limitations does apply, it was tolled by the Union's breach of its fiduciary duty to (1) inform him of his right to sue after his grievance was dismissed for Union's untimely selection of an arbitrator and (2) Union's failure to respond to his four demand letters. (App. A, 7a-8a)

On January 31, 1995, the Tenth Circuit entered its opinion and judgment affirming the trial court's dismissal of Edwards' Complaint, stating:

> Unless and until the Supreme Court or Congress reconsiders DelCostello[3], we are bound to apply § 10(b)'s six-month statute of limitations to Vaca-type "hybrid" § 301/unfair representation claims such as the case before us.

---

[3] Various courts and commentators have suggested DelCostello be reconsidered. See, e.g., Mark S. Stein, 10(b) or Not 10(b): A Critical Overview of Court-Selected Limitations Periods in Labor Law, 6 Lab.Law 331 (1990) (questioning propriety of applying §10(b)'s statute of limitations for administrative claims filed with the NLRB to civil claims filed in federal district court). . . . . (App. A, 22a)

And,

> Again construing the record in the light most favorable to Edwards, we find these facts do not rise to the level of "active deception" sufficient to invoke the powers of equity and toll the legal limitations period for hybrid actions set by the United States Supreme Court in DelCostello. (App. A, 30a-31a)

On February 14, 1995, Edwards filed a Petition For Rehearing which was denied February 23, 1995. (App. C, 46a)

REASONS FOR GRANTING THE WRIT

The six-month limitation period established by DelCostello for filing a hybrid lawsuit is unfair to individual union members because it's esoteric, too short and difficult to determine.

The foregoing is dramatically illustrated in Podgers, Matters of Timing, A.B.A.J., May 1995, Vol. 81, at 50, where DelCostello is cited in a parenthetical paragraph as an example of a limitation period that is difficult to determine.

The final paragraph of Podger's article shows Congress has seen the error of its ways, to-wit at 52:

> Congress has taken steps, however, to ease the difficulties for later statutes in which limitations periods are not stated. Under 28 U.S.C. §1658, any federal statute enacted after Dec. 1, 1990, will automatically have a limitations period of four years when a limitation period is not otherwise stated. [Civil actions.]

DelCostello forces union members to guess on crucial legal issues such as: When is a claim a hybrid?

Edwards contends the chronology of his grievance shows he didn't have a hybrid claim when he filed this action because on June 22, 1992, the Union filed a § 301 "Complaint To Vacate Arbitration Award" against Trover in federal court which ruled in favor of Trover on October 28, 1992. That § 301 suit against Trover on his behalf is res judicata as to Trover, leaving Edwards with only a BDFR (breach of duty of fair representation) suit against the Union having a two-year statute of limitations in Oklahoma.

Union's Duty Of Fair Representation

In DelCostello, 462 U.S. 151, 164, n.14 (1983), this Court explained:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent the interests of all employees within a unit, ... The duty stands "as a bulwark to prevent arbitrary conduct against individuals stripped of traditional forms of redress by the provisons of federal labor law." Vaca, supra, at 182, ...

Here, the Union dropped Edwards like a hot potato right after the Court refused to vacate the abritrator's dismissal of his grievance---didn't inform him at all of his legal rights, including his right to sue the union, nor mention a six-month statute of limitations.

In fact the Union didn't even tell him it was dropping him. Edwards had to guess about that, too.

This Court recognizes the vulnerability of the individual union member "In the labor setting, by contrast, the employee

will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union." DelCostello, supra, at 166.

To compound an already bad situation for Edwards, the Union stonewalled all four of his demand letters seeking to settle this matter.

By granting certiorari, the Court will have the opportunity to insist labor unions fully perform their duty of fair representation by informing members of their legal rights at every stage of a grievance process including any statute of limitations that might be applicable.

And, the Court will have the opportunity to find the Union's conduct here tolled any applicable statute of limitations.

Reasons To Reconsider DelCostello

In its opinion herein, the Tenth Circuit states "Unless and until the Supreme

Court or Congress reconsiders DelCostello . . . .; then, in footnote 3 "Various courts and commentators have suggested DelCostello be reconsidered." (App. A, 22a)

By enacting 28 U.S.C. § 1658, Congress prospectively eliminated much of the federal limitations problem. But, it left untouched the existing limitations problems. See 28 U.S.C.A. § 1658, Commentary by David D. Siegel, "No Retroactivity", p. 241.

The six-month period for an administrative appeal is too short for a court action especially when it's created by caselaw making it elusive even for lawyers.

CONCLUSION

The Court should grant a Writ of Certiorari to address this important but troubled area of federal labor law. The Court is urged to do so.

Respectfully submitted,

Jack Marwood Short OBA #8208
Counsel of Record
1709 Utica Square, Suite 230
Tulsa, OK 74114-1420
918/744-8000

May 1995

APPENDIX A - TENTH CIRCUIT OPINION, 46 F.3rd 1047 (10th Cir. 1995)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-7035

January 31, 1995

JERRY L. EDWARDS, Plaintiff-Appellant,

vs.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA) and its AFFILIATED LOCAL 796, Defendants-Appellees.

On Appeal From the United States District Court for the Eastern District of Oklahoma (D.C. No. Civ-93-455-NJ)

Jack Marwood Short, Tulsa, Oklahoma (R. Forney Sandlin, Muskogee, Oklahoma, with him on the brief), for Plaintiff-Appellant.

Scott A. Brooks of Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., Detroit, Michigan (Lisa S. Lane with him on the brief) for Defendants-Appellees.

BALDOCK and BRORBY, Circuit Judges, and *KANE, Senior District Judge.

KANE, Senior District Judge.

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*Honorable John L. Kane, Jr., Senior United States District Judge for the District of Colorado, sitting by designation.

Appendix A

Jerry L. Edwards brought this action against his collective bargaining agent, United Plant Guard Workers of America and its affiliated Local 796 (collectively, the "Union"), alleging the Union breached its duty of fair representation by mishandling his wrongful discharge grievance against his former employer, Trover Security Svc. ("Trover"). The district court dismissed the action as barred by the six-month statute of limitations applicable to "hybrid" breach of collective-bargaining agreement/fair representation claims under the rationale set forth in DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), and this appeal ensued.

Edwards asserts the district court erred in characterizing his suit as a "hybrid" action and contends it more closely resembles one for legal malpractice to which Oklahoma's two-year sta-

tute of limitations should apply. Alternatively, Edwards argues the Union's dilatory conduct in processing his grievance and responding to demand letters he sent after all grievance procedures were exhausted tolled the running of his unfair representation claim. For the reasons set forth below, we affirm.

I. Background

Jerry L. Edwards was an employee of Trover and a member of the Union until his discharge on June 28, 1991. The Union and Trover are parties to a collective bargaining agreement covering the terms and conditions of employment of all employees in the bargaining unit. The agreement incorporates Article VI, § 14 of the Constitution and By-Laws of UPGWA which describes and governs the grievance process and "irrevocably" de-

signates the Union "to appear exclusively and act as [each member's] agent to represent and bind him in the presentation, prosecution, adjustment and settlement of all grievances, complaints or disputes of any kind or character arising out of the employer-employee relationship."

On July 1, 1991, the Union timely filed a grievance on behalf of Edwards protesting his discharge. On July 23, 1991, the Union notified Trover of its intent to arbitrate but did not select an arbitrator until December 23, 1991. The Union justified the five month delay as having been "due to the grievance being reviewed by the regional and national union office . . . [and] then sent for review by counsel." (Aplt's App. at 14.) Trover agreed to the selection, but reserved an objection as to its timeliness.

Appendix A

On March 26, 1992 the arbitrator dismissed Edwards' grievance as untimely in light of the delay between the time the Union notified Trover of its intent to arbitrate and the time the arbitrator was actually selected. On June 22, 1992, still acting exclusively on behalf of Edwards, the Union filed suit against Trover in the district court (Case No. 92-378-S) seeking an order vacating the arbitration award and requiring the arbitrator to consider Edwards' grievance on the merits.

Trover moved for summary judgment and on October 28, 1992, the district court upheld the arbitrator's decision and dismissed the Union's suit.

Edwards was notified of the district court's decision in early November, 1992 and retained legal counsel. On November 28, 1992, counsel mailed the first of four letters to the Union claiming money damages for Edwards' losses caused by the Un-

ion's mishandling of the arbitration process. (Aplt's App. at 48-49). The letter requested payment of a sum certain by December 21, 1992. Id. After receiving no response by the requested date, counsel mailed follow-up letters on December 23, 1992, March 29, 1993 and May 7, 1993. Edwards assumed the delay, like the delay in selecting an arbitrator, was the result of the intra-union review process. (Aplt's Br. at 6.)

Eight months after being notified of the district court's order denying the Union's motion to vacate the award, and still having received no response from the Union to his demand letters, Edwards filed suit against the Union for breach of its duty of fair representation. See Comlaint, No. 93-455-NJ (filed July 6, 1993) (Applt's App. at 1-4). Edwards asserted no claims against Trover in this second

lawsuit, and Trover was not a named defendant.

The Union moved to dismiss Edwards' suit on July 29, 1993, asserting it was barred by the six-month statute of limitations prescribed by §10(b) of the Labor-Management Relations Act (LMRA), applicable to "hybrid" §301/unfair representation actions under DelCostello. The district court agreed and entered it Order Granting Defendants' Motion To Dismiss on December 14, 1993. (Aplt's App. at 59-64.) Edwards' Motion for Reconsideration was denied, and the present appeal ensued.

II. Merits

Edwards raises two issues on appeal. First, he contends the fact the Union filed, and lost, a separate § 301 suit against Trover on his behalf precluded him from filing a §301 claim against Trover and

distinguishes this from a "hybrid" § 301/ unfair representation action subject to the LMRA's six-month statute of limitations. Instead, Edwards argues his suit more closely resembles a legal malpractice action to which Oklahoma's two-year statute of limitations applies. Second, Edwards claims the six-month limitations period, if applicable, was tolled by the Union's breach of fiduciary duty (1) to inform him of his right to sue after his grievance was dismissed for untimely selection of the arbitrator; and (2) to respond to his four demand letters.

We review the Union's motion to dismiss Edwards' claims under the same standard applied by the district court. We accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Mascheroni v. Bd. of Regents, 28 F.3rd 1554, 1560 (10th Cir. 1994). We review

the district court's determination of the applicable statute of limitations de novo. Trustees of Wyoming Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co., Inc., 850 F.2d 613, 617 (10th Cir. 1988). Where, as here, the dates on which the pertinent acts occurred are not in dispute, the date a statute of limitations accrues is also a question of law de novo. Galindo v. Stoody Co., 793 F.2d 1502, 1509 (9th Cir. 1986); see Lucas v. Mountain States, 909 F.2d 419 (10th Cir. 1990).

A.

Statute of Limitations

1.

Section 301 of the LMRA makes collective bargaining agreements enforceable in federal court, but provides no statute of limitations for claims brought under it. See 29 U.S.C. § 185 (1988). Under these

circumstances, courts generally infer Congress intended the most closely analogous state statute of limitations to apply. See generally Agency Holding Corp. v. Malley-Duff & Associates, Inc. 483 U.S. 143, 147 (1987) (Rules of Decision Act usually requires application of statute of limitations and "(g)iven our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law").

This general rule is neither rigid nor mechanically applied, however. Where state limitations periods are at odds with the purpose or operation of federal substantive law, or where they are determined to be unsatisfactory vehicles for its enforcement, federal courts may decline to borrow them and draw instead from federal

law. DelCostello, 462 U.S. at 161-62.[1] In

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[1] Illustrative examples of cases in which federal interests justified the application of a federal limitations period include Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)(declining to apply state limitations periods to enforcement actions brought by the EEOC under Title VII, reasoning state periods may unduly hinder the policy of the Civil Rights Act of 1964 by placing too great a burden on the agency), McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958)(applying federal Jones Act limitations period to seaworthiness action, reasoning the relatedness of the claims and the practicalities of admiralty personal injury litigation made shorter state statute governing personal injuries inappropriate), and Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946)(holding state limitations periods should not apply to federal causes of action lying only in equity because the principles of federal equity are hostile to the "mechanical rules" of statutes of limitations). See DelCostello 462 U.S. 162.

DelCostello, the Supreme Court determined federal labor policies and the practicalities of § 301 litigation supported the application of the six-month statute of limitations prescribed by § 10(b) of the LMRA, 29 U.S.C. § 160(b), to "hybrid" § 301/unfair representation suits charging an employer breached a collective-bargaining agreement and the union breached its duty of fair representation. Id. at 154-55. We have followed DelCostello and applied § 10(b)'s statute of limitations in Aquinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1463, 1472 (10th Cir. 1993), cert. denied 114 S.Ct. 880 (1994), Lucas v. Mountain States Tel. & Tel., 909 F.2d 419, 420 (10th Cir. 1990), and Rucker v. St. Louis Southwestern Ry. Co., 917 F.2d 1233, 1237-38 (10th Cir. 1990).

The "hybrid" suit is a judicially

created exception to the general rule that an employee is bound by the result of grievance or arbitration remedial procedures provided in a collective-bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 185-86 (1967), discussed in DelCostello, 462 U.S. at 163-64. Where an employee can prove he suffered a wrongful discharge in violation of a collective-bargaining agreement that would have been remedied through the grievance process had the union fulfilled its statutory duty to represent the employee fairly, federal law will provide a remedy. Vaca, 386 U.S. at 185-86, applied in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1983), and Aquinaga, 993 F.2d at 1471-72 ("[i]n such instance, the union has effectively ceased to function as the employee's representative"). To leave the employee remediless under these circumstances would, in the words of the Supreme Court, "be a great

injustice." Vaca, 386 U.S. at 185-86.

Thus, federal law permits an employee to pursue a § 301 action against his employer notwithstanding the outcome or finality of the grievance or arbitration process, provided the employee simultaneously proves he would have obtained a remedy under the agreement but for the union's misconduct. Vaca at 186 & n.11 (citations omitted). It is under this theory of relief that Edwards brought his suit against the Union.

2.

Nevertheless, Edwards contends his suit against the Union is not a "hybrid" § 301/unfair representation action because it was brought against the Union alone after the Union pursued, and lost, Edwards' §301 suit against Trover. We disagree. Under the exception to the finality rule set forth in Vaca, an employee's unfair representation claim against his union and the underlying §301 claim against his em-

ployer are "inextricably interdependent." DelCostello, 462 U.S. at 164-65 (quoting Mitchell, 451 U.S. at 66-67,(Stewart, J., concurring) and Hines,424 U.S. at 570-71), applied in Aquinaga, 993 F.2d at 1471-72. This is true regardless of whether the employee sues the employer, the union or both.

As the Court explained in DelCostello, the case an employee must prove against any defendant is the same:

> "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that that their discharge was contrary to the [collective-bargaining] contract but also carry the burden of demonstrating breach of duty by the union."

DelCostello, 462 U.S. at 165 (internal quotes and citations omitted), applied in Quay v. Sheffield Steel Corp., 25 F.3rd 1058, 1994 WL 235543, *2 (10th Cir. 1994) (unpublished opinion); Aquinaga, 993 F.2d at 1469 n.1 &1471-72. As between the two, however, the ultimate wrong is that of the employer. DelCostello at 168.

Thus, while employees may sue their union for unfair representation, the union may be held liable "only for 'increases if any in [the employee's] damages caused by the union's [wrongful] conduct in process[ing] the grievance.'" Id. (emphasis original) (quoting Vaca, 386 U.S. at 197-98). The result is that a suit against the union by definition is a suit against the employer.[2] Because the employer cannot "hide be-

[2]Although he attempts to do so, Edwards cannot avoid this conclusion by characterizing his suit against the Union as a malpractice, rather than a federal "hybrid," action. In any malpractice action alleging an attorney's negligence in allowing the statutory time limit to run resulted in the loss of a client's claim, it is the value of the underlying claim that provides the measure of the client's damages See generally 7 Am. Jur. 2d Attorney Client § 226, n. 50. If the underlying claim is unliquidated, the client must introduce evidence justifying his right to recover on the underlying claim thus undertaking "the proof of two actions in one." Id., n.53. Oklahoma law is no exception. See Allred v. Rabon, 572 P.2d 979, 981 (Okla. 1977)(to prevail in malpractice action against attorney, client must prove he would have succeeded in the underlying action but for the attorney's negligence). Thus, Edwards' contention that his claim against the Union more closely resembles a

hind the union's wrongful failure to act . . . the employer may be (and probably should be) joined as a defendant in the fair representation suit." Vaca, 386 at 197.

Under the analysis in Vaca and DelCostello, it is clear Edwards' suit against the Union cannot exist independently of his underlying wrongful discharge grievance against Trover. We find the district court correctly held Edwards could not avoid the six-month statute of limitations applicable to both elements of a "hybrid" claim under DelCostello by suing only the Union.

3.

Edwards next contends he was precluded from bringing a DelCostello-type "hybrid" action because the Union's action to vacate the arbitration award "was" his §301 suit against Trover. Aplt's Reply at 2.

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legal malpractice action under Oklahoma law is unavailing.

Edwards provides no support for his contention and we reject it out of hand. The very purpose behind the creation of the "hybrid" cause of action in Vaca was to enable an employee to hold his employer accountable for breaching its collective-bargaining agreement notwithstanding a "final" result obtained for him by his bargaining agent. See DelCostello, 462 U.S. at 164-65 (discussing Vaca and its progeny).

Under Vaca, the district court's entry of summary judgment in favor of Trover merely marked the end of the Union's efforts on Edwards' behalf under the collective-bargaining agreement; it did not preclude Edwards from bringing a "hybrid" §301/unfair representation action against the Union, Trover or both. If Edwards could prove the Union's misconduct prevented him from obtaining a remedy against

Trover for wrongful discharge under the terms of the agreement, he would be entitled to relief. See Vaca, 386 U.S. at 186. Edwards' contention that the Union's suit against Trover was somehow res judicata is therefore without merit.

4.

Even assuming his suit against the Union is a "hybrid" action, Edwards contends Oklahoma's two-year statute of limitations for legal malpractice actions should apply. In support of his position, Edwards relies on the Supreme Court's post-DelCostello opinion in Reed v. United Transportation Union, 488 U.S. 319 (1989), which limited DelCostello's scope and re-emphasized the general rule favoring application of state statutes of limitations to federal causes of action lacking express limitations periods of their own. We agree Reed narrowly circumscribed DelCostello's exception to the general rule favoring state statutes

of limitation, but find Edwards' action against the Union nevertheless falls within its reach.

In Reed, the Supreme Court rejected a union's contention that § 10(b)'s six-month limitation period would apply to a member's free speech claim against it under § 102(a)(2) of the Labor-Management Reporting and Disclosure Act. The Court ruled the Union's argument "fails to take seriously (the Court's) admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies." Reed, 488 U.S. at 327. It found the union member's claim more analogous to a civil rights action under 42 U.S.C. § 1983 than to an unfair competition claim under the NLRA, and applied the appropriate state statute of limitations for personal injury actions pursuant to Wilson v. Garcia, 471 U.S. 261 (1985). Id. at 326-27.

Appendix A

The Court in Reed specifically reaffirmed its holding in DelCostello, however, explaining that unlike "hybrid" §301/unfair representation claims, the relationship between § 102(a)(2) claims and federal interests in stable bargaining relationships and private dispute resolution were "tangential and remote." Reed, 488 U.S. at 330-31 & nn.4, 5. The Court found the fact §102(a)(2) claims "sometimes have some impact on economic relations between union and employer and on labor peace" insufficient to require the application of §10(b)'s six-month statute of limitations for unfair labor practice claims:

> "This is substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the § 10(b) statute to hybrid § 301/fair representation claims, which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures."

Id. at 331.

We find Reed bolsters, rather than weakens, the holding in DelCostello and its application to Edwards' suit against the Union. Unless and until the Supreme Court or Congress reconsiders DelCostello[3], we are bound to apply §10(b)'s six-month statute of limitations to Vaca-type "hybrid" §301/unfair representation claims such as the one before us.

---

[3] Various courts and commentators have suggested DelCostello be reconsidered. See, e.g., Mark S. Stein, 10(b) or Not 10(b): A Critical Overview of Court-Selected Limitations Periods in Labor Law, 6 Lab. Law. 331 (1990) (questioning propriety of applying §10(b)'s statute of limitations for administrative claims filed with the NLRB to civil claims filed in federal district court). See also Bowdry v. United Air Lines, Inc., 956 F.2d 999, 1005 (10th Cir. 1992) (discussing split in circuit courts' application of DelCostello to former airline employees' claims under the Airline Deregulation Act's Employee Protection Program), cert. denied sub nom United Airlines, Inc. v. Hart, 113 S.Ct. 97 (1992).

For the foregoing reasons, we affirm the district court's determination that a six-month statute of limitations applies to Edwards' suit against the Union for breach of the duty of fair representation.

B.

Accrual/Tolling of NLRA's Six-Month Statute of Limitations

Should DelCostello's six-month statute of limitations apply to his suit against the Union, Edwards contends the district court erred in refusing to toll the statute between the time he received notice summary judgment had been entered against him on October 28, 1992 and mid-May 1993, when the Union failed to respond to his fourth demand letter. Aplt's Br. at 13. Edwards argues the UPGWA's constituion imposed a fiduciary duty on the Union to "fully inform" him of his legal rights after the court refused to vacate the arbitrator's decision, as well as to respond to his demand letters.

Edwards asserts the Union's failure in both regards supports application of the federal equitable tolling doctrine and brings his suit within §10(b)'s six-month limitations period.[4]

1.

Before addressing the equitable issue, we first determine when Edwards' cause of action against the Union accrued. We first addressed the question of what events signal the commencement of the six-month limitation period for "hybrid" § 301/unfair representation actions in Lucas v. Mountain States Tel. & Tel., 909 F.2d 419 (10th Cir. 1990). There we adopted the general rule that the limitation period

---

[4]Edwards received notice of the district court's refusal to vacate the arbitration award dismissing his grievance in November 1992 and filed his action in July 1993. If the statute of limitations was tolled (or his claim against the Union did not accrue) until May 1993, Edwards suit would have been timely filed.

begins to run when an employee "knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violation." Id. at 420-21 (citations omitted).

Application of the general rule turns on the context in which the claim arose. When, as in Lucas, the union rejects or abandons an employee's claim during the grievance process, the six-month limitations period begins to run when the employee learns, or in the exercise of reasonable diligence, should have learned of the union's action. Id. When, on the other hand, a union represents an employee throughout the grievance process, a claim challenging the adequacy of that union's representation does not accrue until the dispute resolution process has been completely exhausted. Id. at 421. Finally, when the union's alleged breach arises outside the context of processing a grievance, the employee's claim may be tolled by the

employee's good faith attempt to exhaust the grievance process. Id. at 421-22.

Applying the principles set forth in Lucas, the district court determined Edwards' claim against the Union accrued on March 26, 1992 -- the date the arbitrator dismissed his grievance based on the Union's untimely selection of the arbitrator. (Aplt's App. at 63.) As this was fifteen months before Edwards filed the the instant action on July 6, 1993, the district court held Edwards' claim was time-barred. Id. The district court then opined Edwards' suit would have been time-barred even if the limitation period did not begin to run until the Union's request to vacate the arbitrator's decision was denied on October 28, 1992, as that order was issued eight months before Edwards filed suit. Id.

The record in this case, viewed in the light most favorable to Edwards, does not

conclusively demonstrate Edwards' cause of action against the Union accrued March 26, 1992. According to Edwards, he had no reason to believe he had exhausted his remedies under the collective-bargaining agreement as of that date because the Union, as his exclusive bargaining agent, led him to believe it could obtain arbitration on the merits of his grievance. Under the standards applicable to a motion to dismiss, we conclude a reasonable trier of fact could find Edwards reasonably believed the arbitration process was not exhausted until he received notice in November 1992 of the district court's October 28, 1992 decision. See Rucker, 917 F.2d at 1238 (summary judgment on unfair representation claim could not be predicated on §10(b)'s statute of limitations where there was evidence to support employees' claim they were unaware union had abandoned their interests); King

v. New York Tel. Co., Inc., 785 F.2d 31, 34-35 (2d Cir. 1985)(given the "special relationship" between a union and its members and the fact the union in that case continued to demand arbitration, record did not conclusively demonstrate employee failed to exercise reasonable diligence in learning union had made untimely demand for arbitration), cited favorably in Lucas, 909 F.2d 421. For the purposes of the motion to dismiss at issue here, we find Edwards' cause of action against the Union did not accrue until early November 1992.

2.

Edwards' suit against the Union is nevertheless time-barred unless the facts as alleged by Edwards support a tolling of the limitations period until at least January 6, 1993 -- six-months before Edwards filed his suit. The district court concluded they do not (Aplt's App. at 64),

and we agree.

As set froth above, the timely filing of a hybrid §301/unfair representation claim may be tolled. See Lucas, 909 F.2d at 421-22. In Frandsen v. Brotherhood of Railway, Airline & Steamship Clerks, 782 F.2d 674, 681 (7th Cir. 1986), the Seventh Circuit held a hybrid claim may be tolled "by the pursuit of internal remedies, even where those remedies are ultimately determined to have been futile." In King, the Second Circuit held that in light of the union's control over the grievance process and employee and the employee's relative lack of expertise regarding limitations periods, "it would be incongruous if the [u]nion's own dilatory conduct could provide it with a defense" to an unfair representation suit. 785 F.2d 34-35.

Though unclear, Edwards appears to argue the Union lulled him into inaction after the district court's October 28, 1992

order granting Trover summary judgment by failing to inform him he had six months to sue and by refusing to respond to his demand letters.[5] Edwards points out that in defending against Trover's claim that the Union had unreasonably delayed in selecting an arbitrator, the Union justified its conduct as the result of its time-consuming national review process. Edwards explains his own inaction with respect to filing this suit by stating he assumed his November 1992 demand letter was receiving the same treatment. (Aplt's App. at 6.)

Again construing the record in the light most favorable to Edwards, we find these facts do not rise to the level of

---

[5] This we glean from Edwards' contention that the Union's failure to so inform him or to respond to his counsel's demand letters breached fiduciary duties owed him under the UPGWA Constitution. Because Edwards asserts no claim for breach of fiduciary duty against the Union, his contention would otherwise have no impact on the equitable tolling issue.

"active deception" sufficient to invoke the powers of equity and toll the legal limitations period for hybrid actions set by the United States Supreme Court in DelCostello. Throughout the eight-month period between the district court's October 28, 1992 order and the date this suit was filed, Edwards was represented by counsel who, as evidenced by the content of his demand letter dated November 28, 1992, was fully aware of the Union's misconduct. Under these circumstances, it would have been unreasonable for Edwards to believe his remedies under the collective-bargaining agreement had not been exhausted or that his claim against the Union had not accrued. See King v. New York Tel. Co., Inc., 873 F.2d 36, 38 (2d Cir. 1989)(reliance on Union's overtures to attempt arbitration unreasonable in light of representation by counsel), decided on appeal after remand from King v. New York

Tel. Co., Inc., 785 F.2d 31 (2d Cir. 1986). The most that can be said in these circumstances is the patience and deference shown an insentient bargaining agent are not warranted by a harsh reality.

The application of equitable doctrines rests in the sound discretion of the district court. Purrington v. University of Utah, 996 F.2d 1025, 1030 (10th Cir. 1993); State of Ohio v. Peterson, Lowry, Ball, Barber & Ross, et al., 651 F.2d 687, 694 & n. 15 (10th Cir. 1981), cert. denied, 454 U.S. 895 (1981). We find the district court did not abuse its discretion in refusing to apply the equitable tolling doctrine to Edwards' claims, and its Order Granting Defendants' Motion to Dismiss is therefore AFFIRMED.

APPENDIX B--U.S. DISTRICT COURT DECISION
Filed December 14, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

JERRY L. EDWARDS, Plaintiff,	)	
v.	)	No. 93-455-NJ
INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA) and its AFFILIATED LOCAL 796, Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On July 6, 1993, plaintiff instituted this action against defendant International Union, United Plant Guard Workers of America and its affiliated Local 796 (collectively referred to as the "Union"), pursuant to the provisions of section 301 of the Labor Managment Relations Act, 29 U.S.C. § 185. Plaintiff alleges that the Union breached its duty of fair representation in connection with the prosecution

of his grievance against his employer, Trover Security Service, Inc. ("Trover"). Specifically, plaintiff alleges that the Union's "failure to timely prosecute [his] grievance through arbitration on its merits is a breach of [the Union's] duty to represent [him] fairly." Complaint, ¶ 8.

The underlying facts which give rise to plaintiff's claim are not in dispute. Plaintiff was employed by Trover as a security officer assigned to the McAlester Army Ammunition Plant in McAlester, Oklahoma, until his discharge on June 28, 1991. Plaintiff was a member of the Union which was a party to a collective bargaining agreement with Trover covering the terms and conditions of the employment of the member employees. On July 1, 1991, the Union timely filed a grievance contesting plaintiff's discharge. On July 23, 1991, the Union notified Trover of its intent to arbitrate the grievance. On De-

cember 23, 1991, an arbitrator was selected. Trover agreed on the selection of the arbitrator, but reserved its objection to the timeliness of the selection. On March 26, 1992, the arbitrator dismissed plaintiff's grievance as untimely in light of the delay between the time the Union notified Trover of its intent to arbitrate and the time the arbitrator was actually selected. On June 22, 1992, the Union filed an action in this court (Case No. 92-378-S) against Trover seeking an order vacating the arbitration decision and requiring the arbitrator to consider the merits of plaintiff's grievance. On October 28, 1992, this court granted Trover's motion for summary judgment and denied the Union's requested relief. On July 6, 1993, plaintiff filed the instant action.

Given this series of events, the Union has now moved the court to dismiss plaintiff's complaint claiming it is bar-

red by the applicable statute of limitations. Drawing all inferences in favor of plaintiff for purposes of this motion to dismiss, the Union claims this action, filed on July 6, 1993, was instituted over eight months after the limitation period accrued on October 28, 1992, the date of this court's order denying the Union's requests to vacate the arbitration award and compel the arbitrator to consider the merits of plaintiff's grievance; consequently, the Union contends dismissal is appropriate because plaintiff has failed to bring his suit within the six-month limitation period established for unfair representation suits by the United States Supreme Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). In DelCostello, the Supreme Court established a six-month limitation period for hybrid § 301/unfair representa-

tion suits. This hybrid suit refers to the two claims brought by an employee dissatisfied with the handling and outcome of his grievance/arbitration proceedings: one against the employer for breach of the collective bargaining agreement and one against the union for breach of the union's duty of fair representation. Id. at 164. In determining what statute of limitations should apply in hybrid suits, the Supreme Court referred to section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and adopted its six-month limitation period. Id. at 169.

As noted above, plaintiff has asserted a claim against the Union for breach of duty of fair representation. As a result, plaintiff argues DelCostello's six-month limitation period does not apply because the absence of a claim against Trover precludes this litigation from being classified as a hybrid suit. Under these

circumstances, plaintiff contends that his suit is in the nature of a legal malpractice action governed by Oklahoma's two-year limitation period under 12 O.S. § 95 (Third). The court disagrees.

As noted by the Supreme Court in DelCostello, the claims for breach of the collective bargaining agreement and breach of the duty of fair representation are "inextricably interdependent." Id. at 164-65 (quoting United States v. Mitchell, 451 U.S. 56, 66-67 (1981) (Stewart, J., concurring)).

> "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." . . . The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

DelCostello, 462 U.S. at 165 (quoting Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-571 (1976). Artful drafting of

the complaint by plaintiff herein does not alter the nature of the action instituted. Plaintiff has brought a claim against the Union for breach of duty of fair representation and as part of his burden he must prove both a breach by the Union and that his discharge was contrary to the provisions of the collective bargaining agreement. As a result, plaintiff's claim is a hybrid claim regardless of the fact that plaintiff has chosen not to include a breach of the collective bargaining claim against Trover:

> The law is clear that regardless of who is named as a defendant, a hybrid claim is presented if an employee has a cause of action against both the employer and the union, where the two claims are inextricably linked, and where the case to be proved is the same against both.

Carrington v. RCA Global Communications, Inc., 762 F.Supp. 632, 637 (D. N.J. 1991). Plaintiff has pled a textbook hybrid claim and cannot circumvent the six-month limi-

tation period of DelCostello by the simple expedient of failing to name Trover as a defendant. Carrington, 762 F. Supp. 637. Consequently, the court finds that plaintiff's claim is barred by the statute of limitations as this action was brought more than six months after plaintiff's claim accrued.[1]

In making this determination, the court finds that plaintiff's claim accrued, at the latest, on October 28, 1992, when the court denied the Union's request to vacate the arbitration decision. Court have generally held that the limitation period in a hybrid § 301/fair representa-

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[1] Plaintiff cites Reed v. United Transportation Union, 488 U.S. 319 (1989) and Bowdry v. United Air Lines, Inc., 956 F.2d 999 (10th) cert. denied, 113 S. Ct. 97 (1992) in support of his contention that the six-month limitation period does not apply. Plaintiff's reference to these cases adds nothing to the discussion as neither case involved a hybrid § 301/fair representation claim.

tion suit "begins to run when an employee knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violations." Lucas v. Mountain States Tel. & Tel., 909 F.2d 419, 421 (10th Cir. 1990). The nature of the aggrieved employee's claim must be considered when applying this rule. When the employee is challenging the adequacy of the union's representation throughout the grievance procedure, the employee's fair representation claim "does not accrue until the dispute resolution process has been completely exhausted." Id. In such situation, a hybrid claim will be considered to have accrued the moment the employee learns of the arbitrator's decision. Id.; DelCostello, 462 U.S. at 166 n. 16; Freeman v. Local Union No. 135, Chauffeurs, Etc., 746 F.2d 1316, 1319 (7th Cir. 1984); see also Elisalde v. International Association of Ma-

chinists, District Lodge No. 142, 792 F.2d 114, 115 (8th Cir. 1986), cert. denied, 481 U.S. 1013 (1987) (six-month limitation period begins to run on the date the union informs employee that it will not continue to arbitrate his grievance). Here, plaintiff is challenging the adequacy of the Union's representation by claiming that the Union has failed to timely prosecute his grievance through arbitration. An unfavorable arbitration decision was rendered on March 26, 1992. Under the principles enunciated in Lucas, plaintiff's claim accrued on March 26, 1992 - the date the arbitrator reached a final decision on plain tiff's grievance. Thus, this suit filed some fifteen months after the arbitrator's decision is well past the six-month limitation period. The Union, however, subsequently filed suit in this court to vacate the arbitrator's decision. On October 28, 1992, this court denied the Union's re-

quest. Even assuming for purposes of the instant motion that the limitation period did not begin to run until this court denied the Union's request to vacate the arbitration decision on October 28, 1992, plaintiff's suit filed July 6, 1993, is nontheless barred by the applicable six-month limitation period.

Plaintiff argues that the limitation period should be tolled because the Union failed to inform him that he had six months to file suit and because the Union failed to respond to his demand letters sent after this court's October 28, 1992, order. The court finds that neither of these contentions support tolling of the limitation period as neither impacted plaintiff's ability to bring the instant action. Plaintiff's claim is that the Union failed to timely prosecute his grievance through arbitration. When the arbi-

trator dismissed plaintiff's grievance as untimely on March 26, 1992, plaintiff knew of the facts which would support his duty of fair representation claim. As explained above with respect to the accural issue, plaintiff certainly knew of such facts to support his claim no later than October 28, 1992, when this court denied the Union's request to vacate the arbitrator's decision. The Union's alleged failure to inform plaintiff of the six-month limitation period and its alleged failure to respond to plaintiff's demand letters simply do not affect plaintiff's claim for breach of the duty of fair representation in connection with the timely prosecution of his grievance. In sum, plaintiff cannot unilaterally extend the limitation period by alleging omissions on the part of the Union which are not related to the duty of fair representation claim asserted in his complaint.

Finally, the Union has requested that the court sanction plaintiff under Rule 11 of the Federal Rules of Civil Procedure for filing this action. The Union contends that sanctions are appropriate in light of the clearly controlling six-month limitation period of DelCostello. The court finds that sanctions are not appropriate. While the court ultimately agreed with the Union on the applicability of the six-month limitation period, the court cannot say that plaintiff's arguments in support of the limited application of DelCostello and in support of tolling were frivolous. Plaintiff's attorney's arguments were not persuasive, but the court is not prepared to say that a reasonable and competent attorney would not have believed in the merits of such arguments. Consquently, the Union's request is denied.

IT IS SO ORDERED this 14th day of December, 1993.

S/Frank H. Seay
Frank H. Seay
United States District Judge

APPENDIX C - Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JERRY L. EDWARDS, Plaintiff-Appellant, v. INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, AFFILIATED LOCAL 796, Defendants-Appellees.	)	No. 94-7035

ORDER
Entered February 23, 1995

Before BALDOCK, BRORBY, Circuit Judges, KANE*, Senior District Judge

---

This matter comes on for consideration of Appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISHER, Clerk

By: S/Opal A. Carter
Opal A. Carter
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
JUN 22 1995
OFFICE OF THE CLERK

No. 94-1913

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

JERRY L. EDWARDS,

Petitioner,

V.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA) and its AFFILIATED LOCAL 796,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Scott A. Brooks
Counsel of Record
GREGORY, MOORE, JEAKLE, HEINEN, ELLISON & BROOKS, P.C.
3727 Cadillac Tower
65 Cadillac Square
Detroit, MI 48226
(313) 964-5600

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED

1. Should the Court reconsider its established decision in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), that federal policy dictates a six-month statute of limitations for hybrid breach of the duty of fair representation claims brought under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185?

2. Is there any reason Petitioner's §301 hybrid claim is not governed by the statute of limitations established by DelCostello?

3. Did Respondent have an affirmative duty to inform Petitioner of his alleged right to sue Respondent, and the applicable statute of limitations for doing so, especially where Petitioner's counsel sent Respondent a demand letter indicating suit would be brought?

4. Did Petitioner's counsel, by sending four unsolicited demand letters to which Respondent did not respond, cause the statute of limitations to be tolled?

LIST OF PARTIES

Petitioner: Jerry Edwards, an individual

Respondent: International Union, United Plant Guard Workers of America (UPGWA) and its Affiliated Local 796, a labor organization

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No. 94-1913

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

JERRY L. EDWARDS,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA (UPGWA) and its AFFILIATED LOCAL 796,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THIS HONORABLE SUPREME COURT:

The respondent, International Union, United Plant Guard Workers of America (UPGWA) and its Affiliated Local 796, respectfully requests that this Court deny the Petition for Writ of Certiorari

which seeks review of the Tenth Circuit's opinion below. That opinion is reprinted in the Petition for Certiorari at Appendix A.

OPINIONS BELOW

In addition to the January 31, 1995 10th Circuit Court of Appeals Opinion, and the December 14, 1993 District Court Decision cited in the Petition for Writ of Certiorari, two other lower court Opinions issued:

- Tenth Circuit Order Denying Petition for Rehearing, dated February 23, 1995; and
- United States District Court, Eastern District of Oklahoma, Order denying Motion for Reconsideration, issued by Judge Seay, February 8, 1994

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

The jurisdiction of the 10th Circuit Court of Appeals was pursuant to 28 U.S.C. §1291.

The jurisdiction of the District Court was alleged pursuant to 29 U.S.C. §185.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. §185

STATEMENT OF THE CASE

Respondent accepts for these purposes Petitioner's statement of the case except to state that the decisions of the District Court and the Court of Appeals described by Petitioner speak for themselves.

SUMMARY OF THE ARGUMENT

The six-month statute of limitations for hybrid §301 suits alleging breach of a union's duty of fair representation serves federal labor policy, and assists

in resolving collective bargaining agreement disputes promptly and with finality. There is no reason to reconsider DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

Petitioner has filed a hybrid §301 action, which is governed by the statute of limitations established in DelCostello. Respondent's earlier §301 suit against Petitioner's former employer does not remove the instant suit from the six-month statute of limitations.

Respondent did not have an affirmative duty to inform Petitioner of his alleged right to bring this lawsuit, and of the applicable statute of limitations. Petitioner's four demand letters, unanswered by Respondent, did

not serve to toll the statute of limitations.

REASONS FOR DENYING THE PETITION

A. DelCostello Should Not be Reconsidered.

Petitioner asks this Court to overturn the case of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), arguing that the six-month statute of limitations it establishes is "esoteric, too short and difficult to determine." (Petition for Writ of Certiorari, p. 12). To the contrary, the definitiveness of the holding in DelCostello has served the national labor policy well.

The six-month statute of limitations established by DelCostello is not too short. Rather, it tracks the time limitations for filing a comparable unfair labor practice charge under the

National Labor Relations Act, 29 U.S.C. §160(b). Half a year is a reasonable period of time for a union member to recognize that he may have a claim and to file a hybrid action against the union.

In most cases, hybrid actions seek to enforce rights arising under a collective bargaining agreement; such agreements, with few exceptions, require parties to file grievances thereunder within weeks, if not days, of an alleged improper event. The short time periods provided for filing grievances result from the parties' recognition that matters arising under a collective bargaining agreement need to be resolved with finality in a very prompt fashion. This too was recognized by Congress when it created the six-month limitations

period in the National Labor Relations Act.

This Court in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1983), as quoted in DelCostello, 462 U.S. at 169, recognized the importance of resolving collective bargaining agreement issues promptly:

> Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between the company and the union.... This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later. 451 U.S., at 63-64.

Allowing union members more than six months to file an action which ultimately requires interpretation of the collective bargaining agreement "would preclude the relatively rapid final resolution of labor disputes favored by federal law." DelCostello, 462 U.S. 168.

Nor, contrary to Petitioner's claim, is the six-month statute of limitations "difficult to determine." It is clearly stated in DelCostello, and mirrors the time limit applicable if the member seeks to file a charge against the union with the National Labor Relations Board. It applies to all hybrid actions, which ultimately seek to enforce collective bargaining agreement rights.

Petitioner's proposal would cause union members (and their attorneys) difficulties, however. Instead of a

national standard, Petitioner proposes applying state standards which might be codified or might be found in common law, and which would vary from state to state (even though the collective bargaining agreement in question might be national in scope). Petitioner's request to replace the explicit DelCostello limitation with state law would lead to confusion, not clarification, of the time limit for bringing suit.

B. Petitioner's Suit Was a Section 301/Hybrid Action.

Petitioner claims that his lawsuit, brought under 29 U.S.C. §185, and alleging a breach of the duty of fair representation, is not a §301 hybrid action subject to the six-month statute of limitations because Respondent previously filed an action under 29 U.S.C. §185 to vacate the arbitration

award. Without citing authority, Petitioner claims that the Union's suit to vacate the award constitutes *res judicata* against the employer, precluding Petitioner from filing an action against the employer himself. Again, without reference to authority, Petitioner claims that this alleged status places the action he brought not under the DelCostello statute of limitations for suits alleging breach of the duty of fair representation, but under the state statute of limitations for legal malpractice actions.

In its Opinion in this matter, the Tenth Circuit correctly states:

> Edwards provides no support for his contention [that he was precluded from bringing an action against his employer, Trover Security] and we reject it out of hand. The very purpose behind the creation of the "hybrid" cause of action in

> Vaca v. Sipes, 386 U.S. 171 (1967) was to enable an employee to hold his employer accountable for breaching its collective-bargaining agreement notwithstanding a "final" result obtained for him by his bargaining agent. See DelCostello, 462 U.S. at 164-65 (discussing Vaca and its progeny).
>
> Under Vaca, the district court's entry of summary judgment in favor of Trover merely marked the end of the Union's efforts on Edwards' behalf under the collective-bargaining agreement; it did not preclude Edwards from bringing a "hybrid" §301/unfair representation action against the Union, Trover or both. If Edwards could prove the Union's misconduct prevented him from obtaining a remedy against Trover for wrongful discharge under the terms of the agreement, he would be entitled to relief. See Vaca, 386 U.S. at 186. Edwards' contention that the Union's suit against Trover was somehow res judicata is therefore without merit.

Petition Appendix A, pp. 18a-19a.

Regardless of whether he chose to sue his employer, or could have,

Petitioner's suit remains a §301 hybrid action. To succeed in his action against Respondent, Petitioner must prove that his employer violated the collective bargaining agreement. DelCostello, 462 U.S. 165; Vaca v. Sipes, 386 U.S. 171 (1967). Thus, Petitioner's lawsuit is the classic §301 hybrid suit, even though the employer is not named.[1] As such, it was untimely filed, and appropriately was dismissed.

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[1]Even under Petitioner's theory that the lawsuit somehow is for malpractice, Petitioner would still need to prove the underlying claim (against the employer) to prove he was damaged by the Union's alleged improper behavior. See the 10th Circuit Opinion below, Petition Appendix A, p. 16(a), fn 2.

C. The Statute of Limitations Was Not Tolled.

1. Respondent Did Not Owe Petitioner a Duty to Inform Him of His Alleged Right to Sue the Union.

Again without citing authority, Petitioner claims both that Respondent should have informed Petitioner of his right to sue the Union and further to tell Petitioner when the statute of limitations expired. There is no legal basis for this claim that unions must inform members to sue them, and when. Regardless, Respondent maintains it did nothing wrong, and that it did not breach its duty of fair representation; thus, since Petitioner's rights were not violated, there was nothing about which to inform him.

Even were there a legal basis for the claim, factually it must fail. By

letter dated November 28, 1992, Petitioner's attorney wrote the Union that the Union had "breach[ed] . . . its duty of fair representation . . ." and that unless a sum was paid Petitioner, he would "file a lawsuit." (See 10th Circuit Opinion, Petition Appendix A, p. 31a). This letter demonstrates that on November 28, 1992, Petitioner had knowledge of a claim for breach of the duty of fair representation and had retained counsel (who presumably knew the appropriate statute of limitations) to pursue that claim. During the more than seven months that passed until Petitioner filed his lawsuit, what more should (or could) Respondent have informed him?

2. **Petitioner's Demand Letters Do Not Toll the Statute of Limitations.**

As noted above, on November 28, 1992, Petitioner's counsel sent a demand letter threatening legal action. Three more demand letters were sent before the lawsuit was filed. Respondent chose not to respond to any of the letters.

Petitioner claims that the six-month statute of limitations was tolled by the Union's failure to respond to the demand letters. Petitioner does not appear to claim active deception by Respondent, but rather that he was "lulled" into inaction. Since Petitioner was represented by counsel, and Respondent by all accounts took no affirmative action, Petitioner's inaction was his own choice. Considering that in the underlying arbitration the arbitrator dismissed the

grievance due to the Union's alleged inaction, Petitioner and his counsel were well aware of the dangers inherent in waiting. Petitioner and his counsel cannot shift the consequences of their mistake to Respondent.

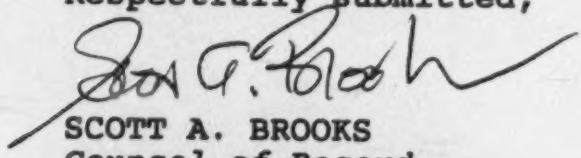
CONCLUSION

The Tenth Circuit Opinion below is not in conflict with the decision of another United States Court of Appeals and does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

Respondent International Union, United Plant Guard Workers of America (UPGWA) and its Affiliated Local 796, requests that this Court deny the

Petition for Writ of Certiorari because it is legally and factually baseless.

Respectfully submitted,



SCOTT A. BROOKS
Counsel of Record
GREGORY, MOORE, JEAKLE,
HEINEN, ELLISON & BROOKS, P.C.
Attorneys for Respondent
65 Cadillac Square, Suite 3727
Detroit, MI 48226
(313) 964-5600

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